82-1717

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CAROL J. KROENING,

PETITIONER,

vs.

ARCHDIOCESE OF MILWAUKEE, a domestic non-stock corporation, ARCHBISHOP REMBERT G. WEAKLAND, and REV. DENNIS C. KLEMME,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WISCONSIN, DISTRICT I

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QUESTION PRESENTED

Whether the state courts violated the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution by denying the petitioner her right to sue the Archdiocese of Milwaukee for annuling her valid Lutheran marriage?

INDEX

AUTHORITIES CITED

PAGE

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CAROL J. KROENING, Petitioner,

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ARCHDIOCESE OF MILWAUKEE, a domestic non-stock corporation, ARCHBISHOP REMBERT G. WEAKLAND, and REV. DENNIS C. KLEMME,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WISCONSIN, DISTRICT I.

Petitioner respectfully prays that a Writ of Certiorari issue to review the judment and opinion of the Court of Appeals of the State of Wisconsin, District I, entered November 16, 1982.

OPINION BELOW

The unpublished opinion of the Court

Of Appeals of the State of Wisconsin, District I, appears in the appendix, p. 1. The Circuit Court of Milwaukee County entered judgment dismissing the petitioner's complaint on February 11, 1982.

JURISDICTION

The judgment of the Court of Appeals of the State of Wisconsin, District I was entered on November 16, 1982. A timely Petition for Review was denied by the Wisconsin Supreme Court on January 11, 1983; and this Petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

QUESTION PRESENTED

Whether the state courts violated the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution by denying the petitioner her right to sue the Archdiocese of Milwaukee for annuling her valid Lutheran marriage?

CONSTITUTIONAL PROVISIONS INVOLVED

This cases involves the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Petitioner, Carol J. Kroening, a Lutheran filed a lawsuit against the Archdiocese of Milwaukee, Archbishop Rembert G. Weakland, and Rev. Dennis C. Klemme for annuling her valid Lutheran marriage without her permission. In her complaint the petitioner alleged a federal question involving a violation of her First and Fourteenth Amendment rights would result if the trial court dismissed the lawsuit. Petitioner further complained that the First Amendment to the United States Constitution did not exempt the above named respondents from claims for invasion of

privacy, libel and slander and intentional infliction of emotional distress.

The trial court disagreed and dismissed the petitioner's complaint on the grounds that the respondents' conduct was protected by the First Amendment to the United States Constitution.

On appeal to the Court of Appeals, District I, the petitioner raised the issue that the dismissal by the trial court of the petitioner's complaint violated the petitioner's First and Fourteenth Amendment rights to the U.S. Constitution. The Court of Appeals, District I, however, affirmed the trial court's decision by stating that the petitioner's claims are barred by the Religion Clauses of the First Amendment to the U.S. Constitution as applied to the states through the Fourteenth Amendment. (See: Appendix pages 1 through 6) The Wisconsin Supreme Court denied a Petition for Review on January 11, 1983.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS OF THE STATE COURTS VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The decisions of the Court of Appeals and the Circuit Court of the State of Wisconsin violate the Establishment Clause of the First Amendment to the United States Constitution by exempting religious societies from civil lawsuits. The state courts erroneously interpreted the United States Supreme Court's holding in The Serbian Eastern Orthodox Diocese For the United States of America and Canada et al. v. Dionisje Milivojevich et al., 426 U.S. 696, 49 L Ed 2d 151, (1976). The facts in the case at bar involve a non-Roman Catholic (third party) suing a religious society (voluntary association).

Traditionally, the United States Supreme Court has held, "Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes..." See: Watson v. Jones, 13 Wall 679, at 714, 20 L Ed 666 (1872) In The General Council on Finance and Administration of the United Methodist Church vs. Superior Court of California, County of San Diego, (Frank T. Barr et al.) 439 U.S. 1369, 58 L Ed 2d 77, (1978) Justice Rehnquist upheld the constitutionality of a third party suit against relgious societies where fraud, breach of contract, or statutory violations are alleged.

> But this Court never has suggested that those constraints apply outside the context of such intra-organizational disputes. The Serbian Orthodox Diocese and the other cases cited by applicant are not on point.

General Council v. Cal Superior Court, supra. atp. 81.

II. THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT GRANT A RELIGIOUS SOCIETY ABSOLUTE FREEDOM TO PRACTICE ITS RELIGIOUS BELIEFS.

Freedom to believe is an absolute right enjoyed by all religions; but freedom to practice one's religious beliefs is always subject to governmental regulation for the benefit of society. The Appellate and Trial Courts deliberately ignored the concept that First Amendment Rights are not absolute rights. See: N.Y. Times Co. v. Sullivan, 376 U.S. 254, 84 S Ct 710, 11 L Ed 2d 686, (1964); Cantwell v. State of Connecticut, 310 U.S. 296, 60 S Ct 900, 84 L Ed 1213, (1940); School District of Abington Township Pa. v. Schempp, 374 U.S. 203, 83 S Ct 1560, 10 L Ed 2d 844, (1963); Reynolds v. United States, 98 U.S. 145, 25 L Ed 244 (1879).

In the case at bar, the petitioner and thousands of non-Catholics throughout the United States are affected by the annulment practices of the respondent. Each year the Roman Catholic Church grants over 60,000 annulments in the United States. These include Catholics as well as non-Catholics.

In the Kroening case, the respondents mailed a questionnaire to petitioner's friends and relatives to elicit personal information about her sexual practices and views on contraception. The use of the questionnaire is an affront to the constitutional right to privacy the U.S. Supreme Court has recognized in Griswold v. State of Connecticut, 381 U.S. 479, 85 S Ct 1678, 14 L Ed 2d, 510 (1965).

The United States Supreme Court has consistently regulated harmful conduct by religious societies. As the Court stated

over 100 years ago in Reynolds v. United States, supra. at pages 166-167:

> To permit unbridled behavior '"would be to make the professed religious belief superior to the law of the land, and in effect, to permit every citizen to become a law unto himself. Government could exist in name only under such circumstances."

The Wisconsin Courts failed to balance the petitioner's right to sue the respondents for interference in her private life with the respondents' right to freely exercise its religious beliefs. The U.S. Supreme Court's ruling in Wisconsin v. Yoder, 406 U.S. 205, 32 L Ed 2d 15 (1972) mandates that courts employ a delicate balancing test when First Amendment Rights conflict with societies rights.

In Costello Publishing Co. v. Rotelle, 670 F. 2d 1035 (1981), the U.S. Court of Appeals for the District of Columbia reversed the U.S. District Court's dismissal of a lawsuit against the National Catholic Conference of Bishops for anti-trust violations.

In reversing the lower federal court, the Court of Appeals in an unanimous decision rejected the bishops' defense that their conduct was protected by the Free Exercise Clause of the First Amendment. In reversing and remanding the case to the trial court, the Court of Appeals adhered to the balancing test of Wisconsin v. Yoder, supra.

The involvement of religious societies in the secular realm presents reoccurring conflicts between the Free Exercise and Establishment Clauses of the First Amendment to the United States Constitution. The United States Supreme Court should grant certiorari to clarify and define the Constitutional guidelines in which a religion can become involved in the private lives of non-members.

The decisions of the Wisconsin courts foster and promote the canon law of the Roman Catholic Church. This type of entanglement

has been consistently rejected by the United States Supreme Court in Walz v. Tax Commissioner of New York, 397 U.S. 664, 90 S Ct 1409, 25 L Ed 2d 168 (1970) and Gillette v. U.S. 401 U.S. 437, 91 S Ct 828, 28 L Ed 2d 168 (1971).

The words of Justice Rehnquist in his dissenting opinion in the Serbian Orthodox Diocese case supra., succinctly sumarize the crux of the petitioner's argument at p. 177 L Ed. 2d:

> To make available the coercive powers of civil courts to rubber-stamp ecclesiastical decisions of hierarchical religious associations, when such deference is not accorded similar acts of secular voluntary associations, would, in avoiding the Free Exercise problems petitioners envision, itself create far more serious problems under the Establishment Clause.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision of the Court of Appeals of the State of Wisconsin, District I.

Respectfully submitted,

Joseph D. Frinzi

Attorney for Petitioner

APPENDIX 1

No. 82-295

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT 1

CAROL J. KROENING,

Plaintiff-Appellant,

v.

ARCHDIOCESE OF MILWAUKEE,
a domestic, non-stock corporation,
ARCHBISHOP REMBERT G. WEAKLAND, and
REV. DENNIS C. KLEMME,

Defendants-Respondents

APPEAL from a judgment of the circuit court for Milwaukee county: HAROLD B. JACKSON, JR. Judge. Affirmed.

Before Decker, C.J., Moser, P.J., and Brown, J.

MOSER, P.J. The dispositive issue[1] presented on appeal is whether Carol J. Kroening's (Kroening) claims are barred by the religion clauses of the first amendment of the United States Constitution, as applied to the states through the fourteenth amend-

ment,[2] and article 1, section 18 of the Wisconsin Constitution. We hold that both of the religion clauses bar Kroening's claims and therefore, we affirm the trial court's dismissal of the claims.

Kroening brought the instant action against the Roman Catholic Archdiocese of Milwaukee, Archbishop Weakland and the officialis of the metropolitan tribunal, Reverend Klemme, (Archdiocese)[3] essentially alleging that she had been damaged as a result of the Archdiocese's having had annulled her prior Lutheran marriage to Charles Wildrick, Jr. (Wildrick).

The Archdiocese, under the authority of the cannons of the Roman Catholic Church, annulled Kroening's prior marriage. This Roman Catholic annulment had no bearing on her prior marital status in the Lutheran Church or under Wisconsin civil law. The annulment was merely to allow Wildrick to

marry in the Roman Catholic Church according to that religious denomination's canons and doctrines.

The first amendment to the United States Constitution reads in pertinent part:"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."[4]

Article 1, section 18 of the Wisconsin Constitution provides:

> The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, errect or support any place of worship, or to maintain any ministry, against his consent; nor shall any control of, or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious socities, or religious or theological seminaries.

The question presented, when one raises an issue under the religion clauses, is

whether the particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so.[5]

It is well-established that the first and fourteenth amendments to the United States Constitution require that civil courts must defer to the resolution of issues of religious doctrine or polity by the highest court of hierarchical church organization.[6] Wisconsin has also long held that civil courts must not determine questions of religious faith, doctrine or schism.[7] Religious freedom encompasses the power of religious organizations to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.[8] Accordingly, we hold that the United States Constitution and the Wisconsin Constitution bar the civil courts of this state from entertaining claims

emanating from any legitimate religious donomination's internal church matters of this nature.

By the Court.--Judgment affirmed.

Recommendation: Not recommended for publication in the official reports.

APPENDIX

[1] We note that Kroening raises five primary issues on appeal; however, we determine that the issue as formulated is dispositive of this appeal. See State v. Waste Management, 81 Wis. 2d 555, 261 N.W. 2d 147, 151 (1978)

[2] The religion clauses of the first amendment were applied to the states through the fourteenth amendment in Abington School Dist. v. Schempp, 374 U.S. 203, 215-16 (1963)

[3] For the purposes of this opinion, we will refer to the defendants-respondents collectively as the "Archdiocese."

[4] We note that the first amendment prohibitions apply to the courts as well as the legislatures. See, e.g., Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440,449 (1969).

[5] Walz v. Tax Comm'n of New York, 397 U.S. 664, 669 (1970).

[6] Jones v. Wolf, 443 U.S. 595, 602 (1979); Serbian Eastern Orthodox Diocese v.

Milivojevich, 426, U.S. 696, 724-725 (1976); Watson v. Jones, 80 U.S. (13 Wall.) 679, 727 (1872).

We note that we are bound by the results and interpretations given the first amendment by the United States Supreme Court. State ex rel Warren v. Nusbaum, 55 Wis 2d 316, 322, 198 N.W. 2d 650, 653 (1972).

7 Hellstern v. Katzer, 103 Wis. 391, 396, 79 N.W. 429 429, 430 (1899).

8 Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 116 (1952).

APP. 7

CIRCUIT COURT

STATE OF WISCONSIN MILWAUKEE COUNTY

CAROL J. KROENING,
Plaintiff,

vs.

JUDGMENT

ARCHDIOCESE OF MILWAUKEE, et. al,
Defendants.

CASE NO. 559-727

The defendants moved to dismiss the complaint in this action, pursuant to sec. 802.06 (2) (f), Stats., upon the ground that the complaint failed to state a claim upon which relief can be granted. By order entered November 30, 1981, the Court dismissed Counts III and V of the complaint. By order entered February 9, 1982, the Court dismissed the remaining Counts, I, II and IV of the complaint.

Now, on motion of Foley & Lardner and Borgelt, Powell, Peterson & Frauen, S.C., attorneys for the defendants, the Court being duly advised in the premises.

IT IS HEREBY ORDERED, ADJUDGED, DECREED AND DECLARED that the complaint, and each count thereof, and this action be and they are hereby dismissed, with prejudice and upon their merits.

Dated at Milwaukee, Wi this 11 th day of February, 1982.

BY THE COURT:

s/ Harold B. Jackson, Jr.

CIRCUIT COURT JUDGE

No. 82-1717

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CAROL J. KROENING,

Petitioner,

vs.

ARCHDIOCESE OF MILWAUKEE, ARCHBISHOP REMBERT G. WEAKLAND and REV. DENNIS C. KLEMME,

Respondents.

ON PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN, DISTRICT I

BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Whether the state courts violated the Religion Clauses of the First Amendment by denying the petitioner the right to sue the Archdiocese of Milwaukee for having determined her former husband's right, under the laws of the Catholic Church, to remarry within the Catholic Church?

STATEMENT REQUIRED BY RULE 28.1

Respondent Archdiocese of Milwaukee is a non-stock, non-profit corporation incorporated under Wisconsin law. It has no parent, subsidiary or affiliate companies.

Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

STATEMENT OF THE CASE

Facts*

The Roman Catholic Church has internal rules and laws governing the validity of marriages and wedding ceremonies within the Catholic Church. Under Church law, one may not marry within the Catholic Church if one has previously entered into a marriage which is still recognized as ecclesiastically valid.

Ecclesiastical validity under the law of the Catholic Church is given to marriages arising from wedding ceremonies performed in other denominations as well as within the Catholic Church. Civil divorce does not affect the ecclesiastical validity within the Catholic Church of a marriage.

A marriage arising from a valid wedding ceremony in the Catholic Church or any other denomination may nonetheless be ecclesiastically invalid within the Catholic Church if the substance of the relationship does not meet the requirements set forth in the law of the Catholic Church. Such invalidity under the laws of the Catholic Church has no necessary relation to the validity of the marriage under either civil law or the law of any other religious denomination.

The Catholic Church has established internal procedures for implementing its religious beliefs and doctrines as to marriage validity. Any member of any religion can request the Catholic Church to make a determination

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*The facts set forth here are derived from the petitioner's complaint (which she did not reprint with her petition) and the affidavit of Father Dennis C. Klemme, one of the respondents. The affidavit, which the trial court considered, is principally a statement of Church law and rules.

of whether he is free to marry within the Catholic Church, or whether such marriage is impeded by the validity under the laws of the Catholic Church of the person's previous marriage. The internal rules and laws of the Catholic Church establish ecclesiastical tribunals and appellate review mechanisms to resolve such questions. This church-wide system for resolving marriage questions includes procedures by which information with respect to the question presented is supplied to the tribunals by the parties themselves and by witnesses.

The Metropolitan Tribunal of the respondent Archdiocese of Milwaukee is the designated body for resolving such ecclesiastical questions within the Archdiocese. Respondent Father Dennis C. Klemme is the Officialis of the Milwaukee Metropolitan Tribunal. Respondent Archbishop Rembert G. Weakland is the Chief Judge of the Tribunal, but he takes no active part in its workings.

The petitioner and Charles O. Wildrick, Jr. were married in a Lutheran Church in 1965. The petitioner obtained a divorce from Mr. Wildrick in a Wisconsin court on March 14, 1980 and remarried later that year.

In July 1980, Mr. Wildrick informed the Milwaukee Metropolitan Tribunal of his desire to marry a Catholic woman in a Catholic wedding. This precipitated the events culminating in this lawsuit. Because of the presumptive validity under Church law of Mr. Wildrick's previous marriage to the petitioner, and his desire to remarry within the Catholic Church, he asked that the Tribunal determine whether he was ecclesiastically free to marry in the Catholic Church, or whether his previous marriage precluded the contemplated Catholic wedding.

If he were not free to remarry within the Church, his prospective new wife could not, under the laws of her Church, marry him and remain a practicing Catholic. The Tribunal proceeded upon Mr. Wildrick's request, as it was required to do by the internal rules and laws of the Catholic Church.

Father Klemme wrote two letters to the petitioner in October 1980. The first advised her of the request to the Tribunal to consider possible "Church freedom to marry in reference to your marriage with Charles Oscar Wildrick, Jr." Father Klemme requested that the petitioner make a statement, promised strict confidentiality and stated that the Tribunal was required to proceed with or without her participation. He explained that there were absolutely no civil effects involved.

Father Klemme's next letter thanked the petitioner for her offer to help in the matter and enclosed the Tribunal's questionnaire for spouse's information*. The petitioner informed Father Klemme that she would not participate in the proceedings. The Tribunal ultimately decided that both Mr. Wildrick and the petitioner were ecclesiastically free within the Catholic Church to remarry. As a result, Mr. Wildrick was able to and did marry in the Catholic Church at Eastertime of 1981.

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*The petitioner refers to this paper in her petition for certiorari as "elicit[ing] personal information about her sexual practices and views on contraception." Petition at 8. In fact, the questionnaire, which is in the record, includes 7 questions (among 74 in all) going to the issues of consummation, marital fidelity and willingness to have children, all of which may be relevant to an ecclesiastical determination of validity. The petitioner was promised that any answers she might choose to give would be kept in strict confidence, as are all of the Tribunal's proceedings. She did not return the questionnaire.

In July 1981, Father Klemme responded to the petitioner's request for information by advising her that the Tribunal had determined that she and Mr. Wildrick were free, within the Catholic Church and according to the Catholic Church's norms, from their earlier marriage. Father Klemme pointed out that the decision did not detract from the parties' contributions to their marriage and had no effect on the status of children. He emphasized that the decision was based on the content of the relationship, and he offered to answer any further questions.

Proceedings Below

On August 7, 1981, the petitioner filed a complaint in five counts, setting forth various theories under which she contended that the respondents had violated her rights by conducting their inquiry into the Catholic Church validity of her first marriage. She sought damages and a permanent injunction to prevent the respondents from ever again determining the validity under Church law of a marriage between non-Catholics. The respondents moved to dismiss the complaint, both because the complaint and each of its counts failed to state a cognizable claim under state law and because the complaint, as supplemented by an explanatory affidavit, showed the existence of absolute defenses to the action. On February 11, 1982, the trial court entered a judgment dismissing the action.

On appeal, the Wisconsin Court of Appeals affirmed. In an unpublished opinion issued on November 16, 1982, it held that the respondents' rights, under the Free Exercise Clause of the First Amendment and a comparable provision of the Wisconsin Constitution, stood as an in-

superable bar to the success of the petitioner's action. Insofar as the petitioner's action sought civil court review of the correctness of the Tribunal's decision, the Court of Appeals, citing this Court's cases and well-established state law, declined to permit such review. The Wisconsin Supreme Court denied discretionary review on January 11, 1983.

REASONS FOR DENYING THE WRIT

By stating the facts of the case in as much detail as they have, the respondents believe that they have eliminated any need for detailed argument to show the insubstantiality of the constitutional issue presented in the petition. The Court of Appeals simply refused to countenance a lawsuit whose avowed sole purpose was to invoke the sovereign power of the State to prevent the respondents from carrying out their religiously mandated duties, with the ultimate end of preventing the petitioner's former husband and other non-Catholics from remarrying in the Catholic Church.

Because a ruling in favor of the petitioner would deny the respondents their First Amendment rights — and infringe upon the First Amendment rights of those whose consciences require a determination of their freedom to marry within the Catholic Church — the Amendment prohibits such a ruling, even if it would otherwise be proper under general state law. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

In addition to the Free Exercise Clause of the First Amendment, that Amendment's protections of free speech and association preclude the petitioner from succeeding on her claim. The respondents' declaration

of Church freedom to marry is at least a constitutionally protected expression of opinion, *see Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974); and the State, even for important reasons (not present here) may not override an association's right to control its internal affiairs, including the right to decide who should be admitted to membership, *see Democratic Party v. Wisconsin ex rel. La-Follette*, 450 U.S. 107, 122 (1981). This latter right certainly extends to a church's deciding who may receive its sacraments.

In the face of these compelling constitutional objections to the success of her lawsuit, the petitioner takes the Court of Appeals to task (Petition at 9) for failing to balance her "right to sue the respondents for interference in her private life" against the respondents' right not to be prevented from performing ecclesiastical duties. The premise of the petitioner's claim is, of course, that she has a substantive right under state law which was violated by the respondents' conduct. That premise is faulty. None of the five counts of the petitioner's complaint states a claim upon which relief can be granted under state law.

The Court of Appeals might have affirmed dismissal on this state law ground, but chose to address instead the respondents' constitutional defense, which it deemed dispositive. Although the language of the court's opinion* in places speaks in more general terms than were, perhaps, necessary to resolve the case, it was deciding only this case, on only these facts, and was certainly taking into consideration both the nature of the respondents' conduct and the insubstantial effect which it had on the

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*The opinion was not published and, thus, has no precendential effect. §§752.41(2), 809.23(3), Wis. Stats. (1981-82).

petitioner (given that the determination of ecclesiastical invalidity has no civil effect and purports to be binding only on the adherents of a church to which the petitioner does not belong). Certainly, the respondents have not sought and do not seek a determination any broader than that the State may not prevent them from carrying out the particular religious function involved in this case.

Moreover, were this Court to reverse the decision below, the case would have to be returned to the Court of Appeals for consideration of the state law sufficiency of the petitioner's claims. Thus, a decision by this Court in the petitioner's favor would not even resolve this one lawsuit. And, contrary to the petitioner's suggestion (Petition at 8) that there are thousands of cases which would be affected by this Court's decision, the respondents are not aware of a single other case in the civil courts in which a non-Catholic is challenging the right of the Catholic Church to determine questions of ecclesiastical freedom to marry within the Catholic Church.

CONCLUSION

The respondents request that the petition for a writ of certiorari to review the decision of the Court of Appeals of Wisconsin, District I be denied.

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